Supreme Court, U. S.
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80-644
No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

G.D. SEARLE & COMPANY,

Petitioner,

vs.

SUSAN COHN and WALTER COHN,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION

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Questions Presented

1. Whether the New Jersey Tolling Provision, N.J.S.A. 2A:14-22 is a constitutionally valid legislative enactment, providing a rational basis for acknowledging the degrees of difficulty of service of process as between represented foreign corporations and non-represented foreign corporations.

2. Whether a Court may imply terms beyond the clear language and intent of the New Jersey Legislature so as to substitute its judgment for that of the Legislature.

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BRIEF IN OPPOSITION

Opinions Below

The opinion delivered in the court below is not as yet officially reported, but is appended to the Petition for a Writ of Certiorari. *Cohn* v. *G. D. Searle & Co.*, —— F.2d —— (Docket Nos. 79-2605 & 79-2406, 3rd Cir. July 23, 1980).

The decision of United States District Court for the District of New Jersey appears at 447 F. Supp. 903 (D.N.J. 1978). It is also appended to the Petition for a Writ of Certiorari.

Jurisdiction

Respondent does not question the jursdiction as set forth in the Petition.

Constitutional Provisions, Statutes and Rules Involved

Respondent does not assert that any additional Constitutional Provisions, Statutes and Rules other than those set out in the Petition are necessary for disposition of the Petition.

Statement of the Case

On December 22, 1963, Plaintiff-Respondent Susan Cohn suffered a cerebral vascular accident, allegedly as a result of the ingestion of a birth control pill. That stroke has left her permanently paralyzed on her left side. The pill was manufactured by Defendant-Petitioner, G. D. Searle & Co., a Delaware corporation with its principal office in Illinois. At that time, the hormonal concentration contained in the pill was much greater than today and there was no warning nor available medical evidence linking the ingestion of birth control pills with severe side effects.

Plaintiffs-Respondents Susan Cohn and Walter R. Cohn, her husband, initiated suit against Defendant-Petitioner on January 29, 1974. Their Complaint, predicated on theories of negligence, breach of warranty, statutory violations and strict liability, was filed in the Superior Court of New Jersey, Law Division, Essex County. On April 1, 1974, the case was removed by Defendant to the United States District Court for the District of New Jersey, pursuant to 28 U.S.C. Section 1441. Jurisdiction was vested in the United States District Court under 28 U.S.C. Section 1332.

On September 8, 1975, Defendant made application to the Court for an order entering summary judgment and dismissing the complaint with prejudice, on the grounds that the action was barred by the Statute of Limitations, N.J.S.A. 2A:14-2. In reply to Plaintiffs' argument that the Defendant was a foreign corporation not represented within the state by "any person or officer" upon whom process could be served, Defendant contended that since the corporation was at all times subject to New Jersey long-arm jurisdiction, the application of the tolling statute violated the equal protection and due process clauses of the United States Constitution.

The opinion of the Court was published at 447 F. Supp. 903 (1978). The court found two issues of first impression: 1) whether or not amenability to long-arm jursdiction created a "representation" within the state within the meaning of the tolling statute, N.J.S.A. 2A:14-22; and 2) whether or not the tolling statute as applied to a foreign corporation subject to long-arm jurisdiction violated the equal protection clause of the United States Constitution. The Court decided the former in the negative. *Id.* at 910. However, as to the latter, the Court found that the statute denied equal protection to foreign corporations amenable to long-arm jurisdiction. *Id.* at 912.

On July 26, 1979, the Court rendered a second opinion, after a hearing on the issue of whether or not Plaintiffs were entitled to the benefit of New Jersey's equitable discovery rule. This second opinion is unpublished. In that opinion, the trial Court found that Plaintiffs were entitled to the benefit of the equitable discovery rule because concrete medical evidence linking Enovid (the drug manufactured by Defendant) was not discoverable until 1970. Having established 1970 as a date from which the cause of action commenced, the second issue decided was whether or not Plaintiffs were entitled to relief due to alleged disability of Mrs. Cohn who, in 1970, was laboring under a severe depression which lasted until 1974. As to this issue, the Court found that "severe depression" was not a disability as contemplated by the New Jersey statute. N.J. S.A. 2A:14-21.

Plaintiffs moved before the Court for a new trial, which request was denied by the Hon. Curtis Meanor on August 29, 1979. A Notice of Appeal to the United States Court of Appeals for the Third Circuit was filed on September 14, 1979 and was docketed on October 9, 1979. On October 18, 1979, Defendant-Respondent filed a Notice of Cross-

Appeal. The case of *Cohn* v. *Searle* was consolidated for purposes of argument and decision with the case of *Hopkins* v. *Kelsey-Hayes, Inc.*

While *Cohn* and *Hopkins* were pending before The Third Circuit, the New Jersey Supreme Court was deciding *Velmohos* v. *Maren Engineering Corp.*, 83 N.J. 282, 415 A.2d 372 (1980) a case involving essentially the same issues. The *Velmohos* decision held that the New Jersey Legislature had decided to maintain the Tolling Provision intact. The statute acts to preserve a potential plaintiff's cause of action where the defendant might not be amenable to long-arm jurisdiction because its whereabouts outside the State are not readily discernible. The object of the Legislature was to deny to a foreign corporation without an agent upon whom process might be served the unjust reward of immunity from suit because it was secreted from view. The possible use of long-arm jurisdiction over certain corporations was held not to be duplicative of the Tolling Provision because long-arm service is not available in those instances where the potential New Jersey litigant cannot guess among which of the other 49 states to search for the defendant. Therefore, because the statute is rationally related to achieving a constitutionally permissible objective, the Tolling Provision was upheld by the New Jersey Supreme Court.

The Third Circuit also rejected the constitutional claims advanced by the out-of-state defendants because they were not amenable to in-state service of process because they did not have a registered agent. Again, the presumption of validity given to legislative enactments and the certain, rational basis of the statute in achieving its constitutionally permissible purpose provided the foundation for the upholding of the Tolling Provision.

The July 23, 1980 decision of the Third Circuit remanded this case to the Federal District Court in order that the trial on the merits might proceed. Defendant-Petitioner filed its petition seeking a Writ of Certiorari on October 21, 1980.

ARGUMENT

The constitutional validity of the New Jersey Tolling Provision has been upheld against multiple challenges by the United States District Court for the District of New Jersey, the New Jersey Supreme Court and the United States Court of Appeals for the Third Circuit, and there is no need for this Court to hear the matter further.

The granting of a writ of certiorari is not a matter of right, but of sound judicial discretion, and thus is to be granted only where there are special and important reasons for doing so. There are none in the instant case. The primary reason that this Court should deny the petition for writ of certiorari is the firmness of the decisions of the United States Court of Appeals for the Third Circuit and the New Jersey Supreme Court. Petitioner has failed to show that the disposition of this case by the Third Circuit has created any need for the granting of a writ by this Court.

Petitioner alleges that the New Jersey Statute of Limitations Tolling Provision, N.J.S.A. 2A:14-22, violates established principals of Due Process and Equal Protection. The issue is whether or not the Legislature of the State of New Jersey may constitutionally differentiate between foreign corporations represented in the State by an officer upon whom process may be served, and foreign corporations

which are not represented for purposes of service of process. The recent decision of the United States Courts of Appeals for the Third Circuit in the consolidated cases of *Cohn* v. *G. D. Searle & Co.*, —— F.2d —— (Docket Nos. 79-2406 and 79-2605, 3rd Cir. July 23, 1980) and *Hopkins* v. *Kelsey-Hayes, Inc.*, —— F.2d —— (Docket No. 79-1881, 3rd Cir. July 23, 1980) resolved the conflicting opinions of parallel judges in the Federal District Courts for the District of New Jersey.[1] Nonetheless, Petitioner offers as a reason for the granting of its petition the argument that "the Third Circuit's adoption of that decision in the instant case causes confusion within the Circuit . . ."[2]. This statement is clearly erroneous. Any possible earlier confuion was decisively extinguished by the determination of the United States Court of Appeals (See Supreme Court Rule 17).

Petitioner also seeks the granting of a writ on the basis that the Third Circuit's opinion "conflicts with the opinions of other state courts of last resort"[3]. The New Jersey Supreme Court completely rebutted Petitioner's contention in *Velmohos* v. *Maren Engineering Corp.*, 83 N.J. 282, 416 A.2d 372 (1980). In *Velmohos*, Justice Pashman speaking for the majority stated that the New Jersey tolling statute is narrowly drawn and deals with "representation" not with "absence" as do other state statutes:

> . . . While courts of other states have construed tolling statutes to be inapplicable to foreign cor-

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[1] See *Cohn* v. *Searle*, 447 F. Supp. 903 (D.N.J. 1978), rev'd —— F.2d —— (3rd Cir. July 23, 1980) (Petitioner's Appendix p. 28a).

[2] Page 8, Petition for Writ of Certiorari.

[3] Page 8, Petition for Writ of Certiorari.

> porations subject to long-arm service, the statutes involved were phrased in terms of 'absence' from the states—general language which more readily lends itself to flexible interpretation.
>
> • • •
>
> The New Jersey statute, however, is very narrowly drawn. It speaks not of presence or absence, but of *representation* within the State.

Id., Respondent's Appendix at p. 12a.

Further, in a footnote reply to the dissent of Justice Sullivan, Justice Pashman stated:

> For this reason, my Brother Sullivan's observation that our holding "places this Court with a minority of jurisdictions," post at —— (slip op. at 2), is misleading. Our result today differs from those of other courts because of a difference in statutory language, not a defect in reasoning. Without describing and comparing the various tolling statutes that have been interpreted, any reference to "majority" and "minority" rules is meaningless. *Id.* footnote at 8.

The fact that appellate courts of other states have ruled that non-resident defendants amenable to service of process are not subject to their respective tolling statutes can provide Petitioner with no solace. In those cases the courts ruled on statutory not constitutional grounds. *Harwitch* v. *Adams*, 52 Del. 13, 151 A.2d 286 (Super. Ch. Del.) aff'd, 52 Del. 247, 155 A.2d 591 (Del. 1959); *Will* v. *Malosky*, 432 Pa. 246, 247 A.2d 788 (1968). Construction of those statutes was based on legislative histories and policies as well as language which differs from that of the New Jersey statute. Uniformity among the states in the enactment

of statutes is not required. Federal courts are bound by the construction of the state's highest court. The construction of the New Jersey statute by the New Jersey Supreme Court in *Velmohos, supra,* is controlling. For the purpose of service of process upon a foreign corporation, the New Jersey Legislature saw fit to delineate between in-state "representation" and "presence or absence". Other state legislatures did not. Both the New Jersey Supreme Court and the United States Court of Appeals for the Third Circuit examined the specific statutory language and are in accord that there is a rational, constitutionally permissible basis for the New Jersey tolling statute.

Notwithstanding the above, Petitioner persists in its argument that amenability to service of process under the New Jersey Court "long-arm" rule, N.J.R. 4:4-4(c)(1) is synonymous with "presence" in the state for purposes of compliance with New Jersey's Statute of Limitations for Personal Injury Actions, N.J.S.A. 2A:14-2. It is upon this flawed analogy that Petitioner grounds its argument that unrepresented foreign corporations are deprived of the constitutional rights to due process and equal protection of the law.

Extra-territorial service is not simply an alternative to service within the State. *Velmohos, supra,* at 296. Under New Jersey Court Rule, N.J.R. 4:4-4(c)(1), long-arm service requires the plaintiff to first attempt to make service within New Jersey. If this fails, plaintiff can serve extra-territorially only "(i)f it appears by affidavit of plaintiff's attorney or of any person having knowledge of the facts that after diligent inquiry and effort personal service cannot be made." N.J.R. 4:4-4(c)(1). Furthermore, the affidavit must satisfy a court that service will be consistent with due process of law. *Velmohos, supra* at 296. But the availability of long-arm jurisdiction is of no significance

in those instances where the future out-of-state defendant is not readily visible to a potential plaintiff. If the corporation cannot be readily located, the availability of long-arm jurisdiction is moot.

The New Jersey Legislature chose not to give the benefit of the statute of limitations defense to certain foreign corporations, those not represented in New Jersey. This decision was made because these defendants, in general, present plaintiffs with problems in executing service of process. A plaintiff may very well not know in which of the remaining 49 states to begin looking for a non-represented corporate defendant. The fact that some non-represented defendants may be easily servable is of no consequence. The equal protection clause does not require that statutes be drawn with mathematical nicety. *Cleveland* v. *National College of Business*, 435 U.S. 213, 221 (1978). The New Jersey Legislature created a rational classification by distinguishing between the "presence" of an in-state agent of a foreign corporation who is amenable to service of process and a foreign corporation without an agent for service of process. The distinction in the degrees of difficulty in executing service substantiates the rationale of this legislative classification and there is no need for this Court to further review the constitutionality of the statute.

The New Jersey Tolling Statute has a rational basis and furthers a constitutionally permissible goal.

Equal protection and due process questions are first evaluated by reference to the appropriate constitutional standard. Petitioner contends that N.J.S.A. 2A:14-22, by treating foreign corporations without representation in New Jersey differently than foreign corporations registered in New Jersey, violates the Equal Protection Clause

of the Fourteenth Amendment and denies substantive due process. There is no fundamental interest or suspect classification involved with the tolling statute. *See Cohn, supra,* at Petitioner's Appendix, p. 18a. Therefore, because the rational basis test applies, Petitioner must meet the heavy burden of showing that the statute is irrational. It has not done so.

> In reviewing a state statute or constitutional provision under the due process or equal protection clause, a court must determine if the provision rationally furthers any legitimate state objective. "For these purposes, it is, of course, constitutionally irrelevant whether this reasoning in fact underlay the legislative decision . . ." *Flemming* v. *Nestor,* 363 U.S. 603, 612 (1960). The court may even hyopthesize the motivations of the state legislature to find a legitimate objective promoted by the provision under attack. See *Weinberger* v. *Salfii,* 422 U.S. 749, 780 (1975); *Williamson* v. *Lee Optical Inc.,* 348 U.S. 483, 487-490 (1955); *Trafelet* v. *Thompson,* 594 F.2d 623, 626 (7th Cir.), cert. denied, —— U.S. ——, 48 U.S.L.W. 3239 (Oct. 1, 1979).

Cohn, supra, at Petitioner's Appendix, p. 19a, quoting *Malmed* v. *Thornburgh,* No. 79-2467, slip op. at 7, (3rd Cir. May 13, 1980) (Aldisert, J.) (emphasis in original).

In support of its equal protection argument, Petitioner relies on *Reed* v. *Reed,* 404 U.S. 71 (1971). *Reed* involved a challenge to an Idaho statute which preferred males to females among relatives of the same degree in situations where there was competition to administer intestate estates. The United States Supreme Court reversed the Idaho Supreme Court on the basis that a choice mandated solely on the basis of sex involves a suspect classification for purposes of a challenge under the Equal Protection

Clause, and such a classification is, therefore, subject to strict scrutiny. The absence of a compelling state interest in preferring males to females required the Idaho statute to be struck down. It is an anomaly that Petitioner cites such a clearly distinguishable case as *Reed.* In the case *sub judice,* the standard for review of the New Jersey statute is whether or not it has a rational basis. *Cohn, supra,* at Petitioner's Appendix p. 18a. The statute clearly passes such a review and Petitioner's references to "suspect classification" cases are misleading.

Petitioner also relies upon *Royster Guano Co.* v. *Virginia,* 253 U.S. 412 (1920) wherein a Virginia taxing statute was declared discriminatory in that it created an illusory classification between domestic corporations deriving profits from business done within the state and domestic corporations deriving income solely outside the state. The arbitrary distinction created by the State Legislature in *Royster,* imposed a tax burden on the former, but not on the latter. There, no permissible rational basis existed for favoring certain domestic corporations over others. In the instant case, the United States Court of Appeals for the Third Circuit, the New Jersey Supreme Court and one Federal District Court for the District of New Jersey have declared the tolling provision to be rationally related to achieving a constitutionally permissible goal.

Petitioner also argues that the New Jersey tolling statute offends the Due Process Clause of the United States Constitution. It theorizes[4] that the construction of this statute *by the courts* creates a conclusive presumption which, in turn, is irrational and, therefore, a deprivation of due process of law. The logic of this argument is fallacious, created only by an unjustified manipulation of words.

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[4] Page 11, Petition for Writ of Certiorari.

Petitioner offers no citation for this creation of an irrebutable presumption. To be declared offensive, statutory presumptions must be contained within the ambit of the language of the statute under attack. Courts have been constantly restrained from imposing additional meaning upon plain language and prevented from stepping into the province of legislative bodies. While *Vlandis* v. *Kline*, 412 U.S. 441 (1973), cited by Petitioner, does concern a statute creating a permanent irrebutable presumption, it is not authority for the specious argument that an irrebutable presumption may be created by judicial construction of a statute and that such construction renders the statute unconstitutional. *Heiner* v. *Donnan*, 285 U.S. 312 (1932) also cited by Petitioner, likewise fails to support its theory. In *Heiner*, a constitutional challenge was made to a federal statute which created a conclusive presumption that gifts made within two years prior to the donor's death were made in contemplation of death, thus requiring payment of a higher estate tax. In both *Vlandis* and *Heiner*, the irrebutable presumption was found within the statute under attack. In the instant case, not only is there no irrebutable presumption implied by the construction of a court below, but Petitioner similarly fails to substantiate or even put forth a claim of an impermissible irrebutable presumption contained in the specific language of the statute itself.

Both the New Jersey Supreme Court and the United States Court of Appeals for the Third Circuit have acknowledged that the Tolling Provision falls easily within the ambit of the rational basis standard. Writing for the New Jersey Supreme Court, Justice Pashman stated:

> The flaw in defendants' argument is that it recognizes as rational only a distinction based on the impossibility of obtaining jurisdiction over a for-

> eign corporation. It refuses to acknowledge that among amenable foreign corporations there are *degrees of difficulty* in effecting service. A recognition of these degrees of difficulty supplies a present rational basis for distinguishing between represented corporations and those unrepresented but amenable to long-arm service.
>
> The purpose of the statute is not confined to providing relief when service is impossible . . . See *Fidelity Deposit Co. of Maryland* v. *Abagnale*, 97 N.J. Super. at 143-144, 234 A.2d 511. There is a conceivable rational basis to support tolling.
>
> The view might have been taken that the facility of extra-territorial service did not meet the hardship of locating a departed resident in the sprawling country beyond New Jersey's borders. (*Id.* at 144, 234 A.2d at 518).

Velmohos, supra, at Respondent's Appendix, p. 17a-18a (emphasis added).

The strongest foundation upon which the rational basis of the tolling provision rests was cogently stated by Justice Garth of the Third Circuit:

> This distinction between represented and non-represented foreign corporations reflects the pragmatic difficulties which may be encountered by plaintiffs suing foreign corporations. Since service of process under the long-arm statute is more difficult and time-consuming to achieve than service within the state, and since out-of-state, non-represented corporate defendants may be difficult to locate, let alone serve, tolling the statute of limitations protects New Jersey plaintiffs and facilitates their lawsuits against such defendants. Because the tolling provision fulfills the

> legitimate state purpose of easing the special burdens of suits against non-represented foreign corporations, we cannot say that the distinction which it recognizes is irrational.

Cohn, supra, Petitioner's Appendix, p. 23a; *Accord*: *Hopkins* v. *Kelsey-Hayes,* 463 F. Supp. 539, 542 (D.N.J. 1978).

While large national and multi-national entities may or may not be visible, there remains a plethora of other non-represented corporate defendants safely secreted from view. A denial of the validity of the Tolling Provision would prevent New Jersey plaintiffs with a justiciable cause from obtaining possible redress. When the corporation may be served in the State, jurisdiction may be obtained with relative ease. When the defendant is not represented in the State, a plaintiff should not be forced to commence to search through the other 49 states to find the defendant. Though some non-represented defendants may be servable because of their out-of-state visibility, the New Jersey statute ensures that defendants which are not easily located will not be unjustly shielded from potential lawsuits. The rational basis of the New Jersey statute has been evaluated, confirmed, and re-confirmed. There is no need for this Court to re-examine the statute.

Courts are not to interpose their own judgment in contravention of the plain language and clear intent of a state statute.

Petitioner's equal protection argument, aside from being facially unsound, would, if successful, have the negative impact of sanctioning partial repeal of a legislative enactment by a judicially-created Rule of Court. *Vel-*

mohos, supra, at Respondent's Appendix, p. 12a. Such a determination would result in a collision of the authority of two branches of government, contrary to the rule of separation of powers. The Third Circuit in *Cohn, supra,* and the New Jersey Supreme Court in *Velmohos, supra,* both concluded that the New Jersey statute satisfies constitutional standards. Because the heavy presumption of the validity of a legislative enactment has not been even remotely displaced by the arguments advanced by Petitioner, this Court should not issue a Writ of Certiorari.

The Petitioner seeks to have this Court construe a state statute so as to render it ineffective, i.e. by declaring the Tolling Provision a nullity because some non-represented foreign corporations which commit torts within the state might possibly be amenable to long-arm service. This argument has been strongly rejected. *See*: *Hopkins, supra,* Respondent's Appendix at p. 29a by Judge Brotman. Referring to the New Jersey Supreme Court opinion in *Velmohos, supra,* Circuit Judge Garth noted that the defendants sought to have the Tolling Provision's phrase "not represented" interpreted as "not amenable to service", in total disregard of the Legislature's plain language and stated purpose. See *Velmohos, supra,* Respondent's Appendix at p. 12a, referring to "Statement Accompanying Assembly No. 467 (1949)".

Since long-arm jurisdiction did not exist at the time of the enactment of the tolling provision, the statute's phrase "representation by a corporation" could not have included amenability to long-arm jurisdiction. Therefore, the Tolling Provision and long-arm jurisdiction are not alternatives. Rather, they each serve an independent purpose. The Tolling Provision operates to ensure that a plaintiff's cause of action will be preserved against a non-represented foreign corporation which might otherwise be shielded

from long-arm jurisdiction because it is not readily visible. See *Velmohos, supra,* Respondent's Appendix at p. 14a. Thus, only through a tortured interpretation of both the statute's plain language and the Legislature's clear intent can the Petitioner's "duplication of purpose" argument prevail.

The third argument advanced by Petitioner is that the New Jersey tolling statute places an undue burden on interstate commerce. Reliance is placed by Petitioner on cases in which the out-of-state corporate defendants, engaged solely in interstate commerce, were required to perform an affirmative act, such as obtaining a certificate of authority, before doing business in the forum state. *Eli Lilly & Co.* v. *Sav-On Drugs, Inc.,* 366 U.S. 276 (1961). By contrast, the New Jersey tolling statute places absolutely no affirmative requirement, by way of filing, taxing or otherwise, on an out-of-state corporate defendant. Rather, they are unable to avail themselves of an affirmative *defense,* and then only in a limited number of cases. The availability of such a defense to those legitimately within the statutory class should not be construed as a "burden" on those who are not a part of the protected statutory scheme.

The Petitioner's reference to *Sioux Remedy Co.* v. *Cope,* 235 U.S. 197 (1914)[5], is completely specious. That case involved a corporation's rights to sue others. Such an issue is not present in the instant case, nor is it relevant as the Petitioner has never contended it did not have the right to sue in the Courts of New Jersey. Thus, the legislative enactment involved in the case *sub judice* in no way impairs the opportunity of an out-of-state corporation to operate in New Jersey. Petitioner's argu-

[5] Page 15, Petition for Writ of Certiorari.

ment that a plaintiff could wait for decades before commencing suit was effectively rebutted by Justice Pashman:

> "The defense of laches remains available to a defendant in any event." *Velmohos, supra,* Respondent's Appendix. p. 14a.

CONCLUSION

The United States Court of Appeals for the Third Circuit and the New Jersey Supreme Court have concluded decisively that the Tolling Provision enacted by the New Jersey Legislature is rationally related to a constitutionally permissible objective. Because there is no conflict between the Federal Courts and the State Courts, there is no necessity for this Court to hear the matter further and the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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Dated: November 19, 1980

APPENDIX A

Opinion of the Supreme Court of New Jersey

SUPREME COURT OF NEW JERSEY
A-72/143 September Term 1979

KONSTANTINOS VELMOHOS, also known as VELMOHOS KONSTANTINOS,

Plaintiff-Respondent,

v.

MAREN ENGINEERING CORPORATION, an Illinois corporation, and AIR CONVEYING, INC., an Illinois corporation,

Defendants-Appellants,

and

NADUSTCO, INC., a Louisiana corporation,

Defendant.

Argued March 17, 1980—Decided June 18, 1980

On appeal from the Superior Court, Appellate Division, whose opinion is reported at 168 N.J. Super. 520 (1979).

WILLIAM K. LEWIS argued the cause for appellant Maren Engineering Corporation (SHANLEY & FISHER, attorneys; MR. LEWIS and MOLLY B. CANNON, on the briefs.).

Appendix A

JOSEPH DIRIENZO argued the cause for appellant Air Conveying, Inc.

BARRY A. WEISBERG argued the cause for respondent (EDWARD J. DOLAN, attorney).

The opinion of the Court was delivered by PASHMAN, J.

This case raises the question whether the tolling provision of New Jersey's statutes of limitations, N.J.S.A. 2A:14-22, is unconstitutional as applied to foreign corporations that are not represented within the State but are amenable to long-arm service. Invalidation of the statute would render defendant corporations immune from suit in this State, since without the benefit of the tolling statute, the relevant limitations period has expired. We find the statute constitutional and accordingly uphold plaintiff's action as timely.

I

The facts are essentially undisputed. On June 4, 1976, plaintiff filed a complaint in the Superior Court, Law Division, seeking damages for personal injuries sustained by him on August 3, 1973,[1] as a result of an allegedly defective shredder-baler machine manufactured by Maren

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[1] Plaintiff's foot was caught in a conveyor which then drew his entire body into a machine. The accident occurred in the course of plaintiff's employment by Container Corporation of America in New Brunswick, New Jersey. Plaintiff successfully pursued a Worker's Compensation claim against his employer. He was found to have a 5% total permanent neurological disability and a 28⅓% total permanent orthopedic disability.

Engineering Corporation (Maren), an Illinois corporation.[2] The complaint was later amended to include claims against Air Conveying Corporation (Air Conveying), the designer of the machine, also an Illinois corporation.[3]

Both Maren and Air Conveying raised as a defense plaintiff's failure to file suit within the applicable two-year limitations period for personal injury actions. N.J.S.A. 2A: 14-2. Plaintiff asserted that because neither defendant maintained registered offices or agents for services of process in New Jersey, N.J.S.A. 2A:14-22 tolled the statute of limitations and plaintiff's claim was timely.

On motions for summary judgment defendants claimed that New Jersey's tolling statute employed an unconstitutional classification in distinguishing between foreign corporations represented in New Jersey and foreign corporations which were unrepresented but amenable to long-arm service. In support of this contention, they cited *Cohn* v. *G. D. Searle & Co.*, 447 F.Supp. 903 (D.N.J. 1978). In that case the federal district court found that the differing treatment lacked any rational basis. It therefore held New Jer-

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[2] The complaint also named as a defendant George Swan, individually and trading as Swan Engineering Company, a New Jersey entity. By stipulation the complaint was dismissed as to Swan with prejudice on February 3, 1977.

[3] The amended complaint also added claims against Nadustco, Inc., a Delaware corporation with its principal office in New Orleans, Louisiana. However, Nadustco maintained an agent for service of process in New Jersey and was therefore not subject to the tolling statute. It sought dismissal from the action on the ground that the statute of limitations barred suit. Plaintiff did not oppose the motion, and the trial judge granted Nadustco summary judgment on August 22, 1977.

sey's tolling statute unconstitutional as applied to unrepresented foreign corporate defendants amenable to long-arm service.

The trial court adopted the reasoning of the *Cohn* decision. After requiring the defendants to demonstrate their amenability to long-arm service during the period in question,[4] the court granted their motions for dismissal. Plaintiff appealed to the Appellate Division.

Finding no basis for distinguishing the decision in *Lemke* v. *Bailey*, 41 N.J. 295 (1963), the Appellate Division considered itself bound by this Court's views on the tolling statute and held N.J.S.A. 2A:14-22 constitutional, reversing the trial court. 168 N.J.Super. 520 (App.Div. 1979). The court also observed that it was "not satisfied as to the correctness of the conclusion reached in *Cohn*" and noted that a later decision by a federal district court, *Hopkins* v. *Kelsey-Hayes, Inc.*, 463 F.Supp. 539 (D.N.J. 1978),[5] had reached the opposite conclusion on the same issue and had held the statute constitutional. 168 N.J. Super. at 526.

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[4] To that end, Maren had submitted an affidavit of its president outlining the corporation's business in New Jersey between 1969 and 1975. Similarly, Air Conveying presented an affidavit of its president listing sales negotiated and completed in New Jersey between 1969 and 1978. In view of our disposition of this matter, we need not review the trial court's determination of this preliminary issue.

[5] *Cohn* was decided on March 22, 1978. The trial court's orders dismissing plaintiff's complaint against Maren and Air Conveying were entered on June 20 and July 25, 1978, respectively. The *Hopkins* case was decided on December 18, 1978.

Appendix A

Defendants filed notices of appeal as of right;[6] Maren also petitioned this Court for certification, which was granted and merged with the appeals. 82 N.J. 288 (1980). We now affirm.

The effect of N.J.S.A. 2A:14-22 on corporate defendants was left unresolved by the Court in *Lemke* v. *Bailey, supra.* It has been the subject of lower court decisions with conflicting results. Compare *Cohn* v. *G.D. Searle & Co., supra,* with *Hopkins* v. *Kelsey-Hayes, Inc., supra; Whalen* v. *Young,* 28 N.J.Super. 543 (Law Div. 1953), rev'd on other grounds, 15 N.J. 321 (1954) (tolling provision applicable to unrepresented corporate defendant in motor vehicle cases despite availability of substituted service under N.J.S.A. 39:7-2), with *Ferraro* v. *Ferro Trucking Co., Inc.,* 72 N.J.Super. 519 (Law Div. 1962) (same circumstances—tolling provisions inapplicable). A resolution of this conflict first requires analysis of the statute's application to unrepresented foreign corporations that are amenable to long-arm service of process. Finding the provision applicable, we next consider the constitutionality of the statute as applied.

A

The New Jersey tolling statute, N.J.S.A. 2A:14-22, provides:

> If any person against whom there is any of the causes of action specified in sections 2A:14-1 to 2A:14-5 and 2A:14-8, or if any surety against whom

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[6] Motions for leave to appeal were also filed but were dismissed since the appealed judgment was final.

there is a cause of action specified in any of the sections of article 2 of this chapter, is not a resident of this state when such cause of action accrues, or removes from this state after the accrual thereof and before the expiration of the times limited in said sections, *or if any corporation or corporate surety not organized under the laws of this state, against whom there is such a cause of action, is not represented in this state by any person or officer upon whom summons or other original process may be served, when such cause of action accrues or at any time before the expiration of the times so limited, the time or times during which* such person or surety is not residing within this state or *such corporation or corporate surety is not so represented within this state shall not be computed as part of the periods of time which such an action is required to be commenced by the section.* The person entitled to any such action may commence the same after the accrual of the cause therefor, within the period of time limited therefor by said section, exclusive of such time or times of nonresidence or nonrepresentation. [Emphasis supplied]

It is undisputed that neither Maren nor Air Conveying maintained an agent for service of process in New Jersey. A literal reading of the tolling statute's terms would unavoidably lead to the conclusion that the statutory period of limitations never commenced to run on plaintiff's claims. Defendants contend, however, that in light of the expansion of long-arm jurisdiction by state courts over nonresidents, we should construe the statute to provide that the period of limitations is tolled only when a foreign corporation cannot be served anywhere with process from a New Jersey court.

Appendix A

According to defendants the purpose of N.J.S.A. 2A:14-22 is to protect plaintiffs who might otherwise be barred from bringing their actions when certain classes of defendants are involved—essentially defendants who are not subject to the jurisdiction of New Jersey courts. They point to the amendment of the statute in 1949, L. 1949, c. 125, which excluded represented foreign corporations from its tolling effect. This amendment was enacted shortly after a statutory revision that provided acquisition of personal jurisdiction over foreign corporations by personal service within the State on an "officer, director, trustee or a managing or general agent of the corporation * * *." L. 1948, c. 356. Defendants contend that the legislative intent of the two provisions was to compel plaintiffs to institute their actions within the relevant limitations period provided they could obtain jurisdiction over and serve process on defendants. Since under present-day law defendants were amenable to "long-arm" service of process notwithstanding the absence of a representative in New Jersey, see R. 4:4-4(c)(1), defendants claim they are exempt from the tolling provision.

Under the defendants' approach the statutory phrase in N.J.S.A. 2A:14-22—"not represented in this state by any person or officer upon whom summons or other original process may be served"—would be interpreted as though it simply said, "not amenable to service." Thus, a standard involving representation would be transformed into one involving amenability to service. Because neither legislative history nor subsequent developments support this result, we reject defendants' argument and conclude that unrepresented, foreign corporations subject to long-arm service are not exempt from N.J.S.A. 2A:14-22.

Claims similar to defendants' were raised and rejected in *Lemke* v. *Bailey, supra.* In that case plaintiffs brought

suit against nonresidents for damages alleged to have resulted from an automobile accident in New Jersey. 41 N.J. at 297. Defendants argued that since they were amenable to service at all times following the accident by service on the New Jersey Director of Motor Vehicles, the tolling statute did not apply to them. The Court held that such amenability to service did not affect the statute's provision for tolling during nonresidence. *Id.* at 303.

While accepting *Lemke* as correctly decided, defendants here argue that the Appellate Division erred in finding *Lemke* controlling on the separate statutory issue now before us. They correctly note that the *Lemke* Court expressly declined to pass on the effect of the tolling provision on corporate defendants. See *id.* at 301. *Lemke* was concerned only with the effect of N.J.S.A. 39:7-2 on the tolling statute's coverage of individual defendants who were absent from the State. That provision made nonresident motorists amenable to substituted service upon New Jersey's Director of Motor Vehicles. Defendants further emphasize that the legislative history of N.J.S.A. 2A:14-22 more directly supported the conclusion that the tolling provision remained applicable despite the availability of substituted service. The Legislature had considered and passed but later recalled a proposed amendment to the statute exempting nonresident motorists subject to substituted service. The Court in *Lemke* held that legislative inaction in the face of judicial constructions confirmed that N.J.S.A. 39:7-2 did not affect the scope of the tolling provision in N.J.S.A. 2A:14-22. See 41 N.J. at 301.

Defendants contend that none of these factors supports an extension of the rationale in *Lemke*. Noting the absence of any legislative activity concerning the tolling stat-

ute's application to corporations, defendants contend that the presence of contradictory judicial determinations involving foreign corporate defendants, see *supra* at —— (slip op. at 6), renders legislative silence ambiguous.

Despite these asserted bases for distinction, we find the approach taken in *Lemke* applies with equal force to the effects of long-arm jurisdiction on the scope of N.J.S.A. 2A:14-22. As noted by the Court in *Lemke*, the origins of N.J.S.A. 2A:14-22 are traceable to 1820. See 41 N.J. at 298. In its original version New Jersey's tolling provision made specific reference to corporations. See Pennington, *Laws of New Jersey*, 1703-1820 at 670 (1821). The statute remained essentially unchanged until 1949, at which time it provided:

> If any person against whom there is or may be a cause of action specified in sections 2:24-1, 2:24-2, 2:24-3, 2:24-5, 2:24-6; 2:24-16 or 2:24-17 of this title is not a resident of this state when such cause of action accrues, or removes from this state after the accrual thereof and before the expiration of the times limited in said sections, the time or times during which such person is not residing within this state shall not be computed as a part of the periods of time within which such actions are required to be commenced by said sections; and the person entitled to any such action may commence the same after the accrual of the cause therefor, within the period of time limited therefor by said sections, exclusive of such time or times of nonresidence, [R.S. 2:24-7]

In 1949 the tolling statute was amended and for the first time dealt specifically with the corporate defendant. The

amendment exempted from the statute domestic corporations and those foreign corporations maintaining representatives in New Jersey. It thereby extended the benefits of the State's statutes of limitations to those classes of defendants. As amended in 1949, the statute provided as follows:

> If any person against whom there is or may be a cause of action specified in sections 2:24-1, 2:24-2, 2:24-3, 2:24-5, 2:24-6, 2:24-16 or 2:24-17 of this Title is not a resident of this State when such cause of action accrues, or removes from this State after the accrual thereof and before the expiration of the times limited in said sections, or if any corporation not organized under the laws of this State, against whom there is or may be such a cause of action, is not represented in this State by any person or officer upon whom summons or other original process may be served, when such cause of action accrues or at any time before the expiration of the times so limited, the time or times during which such person is not residing within this State or such corporation is not so represented within this State shall not be computed as part of the periods of time within which such actions are required to be commenced by said sections; and the person entitled to any such action may commence the same after the accrual of the cause therefor, within the periods of time limited therefor by said sections, exclusive of such time or times of nonresidence or nonrepresentation. [L. 1949, c. 125]

The statement accompanying the bill read as follows:

> Foreign corporations licensed to do business in New Jersey are now deprived by judicial construction of

the benefit of the statute of limitations. The purpose of this bill is to correct that situation. New York State found it necessary to make a similar change in its law in view of recent court decisions.

[*Statement Accompanying Assembly No. 467* (1949)][7]

As noted above, defendants argue that the intent of the 1949 amendment was to exempt from the tolling provisions corporate defendants amenable to service of process. The fact that the words employed by the Legislature do not mirror this intention is not considered conclusive by defendants. They assert that the present reach of a State court's jurisdictional powers could not have been anticipated when the amendement was drafted. As evidence of this, they note that New Jersey's rule for long-arm service was not passed until 1958, R.R. 4:4-4(d) (effective September 3, 1958) (presently R. 4:4-4(c)(1)), and that it was not until 1971 that this Court recognized that the long-arm rule allows out-of-state service to the "uttermost limits permitted by the United States Constitution," *Avdel Corp.* v. *Mecure,* 58 N.J. 264, 268 (1971).

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[7] At the time of this amendment, New York's tolling statute was Section 19 of the Civil Practice Act, which had been amended in 1943 to include an exception from the tolling statute for individuals or corporations with a designated agent for service of process within New York and for foreign corporations with "one or more officers or other persons in the state on whom a summons for such corporation may be served." 1943 N.Y. Laws, ch. 263. The current version of New York's tolling statute, N.Y. Civ. Prac. Law and Rules §207, specifically provides that it does not apply "while jurisdiction over the person of the defendant can be obtained without personal delivery of the summons to him within the state." 1962 N.Y. Laws, ch. 308, N.Y. Civ. Prac. Law and Rules §207(3) (McKinney 1972).

Defendant's position is unconvincing. It would require us to incorporate into the tolling statute changes in another area of the law which were made after its passage. While courts of other states have construed tolling statutes to be inapplicable to foreign corporations subject to long-arm service, the statutes involved were phrased in terms of "absence" from the state—general language which more readily lends itself to flexible interpretation.[8] See, *e.g.*, *Dedmon* v. *Falls Products, Inc.*, 299 F.2d 173 (5th Cir. 1962) (Alabama law); *Partis* v. *Miller Equipment Co.*, 324 F.Supp. 898 (N.D. Ohio 1970), aff'd, 439 F.2d 262 (6th Cir. 1971); *Phillips* v. *Anchor Hocking Glass Corp.*, 413 P.2d 732 (Ariz. Sup. Ct. 1966); *Lipe* v. *Javelin Tire Co., Inc.*, 536 P.2d 291 (Idaho Sup. Ct. 1975).[9] The New Jersey statute, however, is very narrowly drawn. It speaks not of presence or absence but of *representation* within the State. Such language must be interpreted from the intent of the Legislature in light of circumstances at the time of enactment. 2A Sutherland, *Statutory Construction* §49.02 (4th Ed. 1973); see *Fidelity Deposit Co. of Maryland* v. *Abagnale*, 97 N.J.Super. 132, 143-144 (Law Div. 1967). As defendants themselves recognize, the circum-

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[8] For this reason, my Brother Sullivan's observation that our holding "places this Court with a minority of jurisdictions," *post* at — (slip op. at 2), is misleading. Our result today differs from those of other courts because of a difference in statutory language, not a defect in reasoning. Without describing and comparing the various tolling statutes that have been interpreted, any reference to "majority" and "minority" rules is meaningless.

[9] In some cases state legislative action has made clear that tolling shall not occur when a defendant is amenable to service outside the state. See, *e.g.*, Ill. Ann. Rev. Stat. ch. 83 §19 (Smith-Hurd 1979); N.Y. Civ. Prac. Law and Rules §207 (McKinney 1972).

stances prevailing at the time of the 1949 amendment did not include long-arm service on foreign corporations. *We cannot accept the invitation to adopt this latter development as the premise for ignoring clear and unambiguous statutory language.*

Defendant Air Conveying argues in the alternative that New Jersey's long-arm rule created a new class of corporate defendants not covered by N.J.S.A. 2A:14-22. There is no merit to this contention. The tolling statute originally applied to all foreign corporations. See *Cramer* v. *Borden's Farm Products Co., Inc.*, 58 F.2d 1028 (S.D.N.Y. 1932) (under New Jersey law New York corporation licensed to do business in New Jersey not resident of New Jersey and therefore is within the scope of tolling statute). It was not until 1949 that any foreign corporations became exempt from its effects. See *Statement Accompanying Assembly No. 52* (1948). By design, therefore, the statute includes all corporations not specifically exempted by amendment. In effect, Air Conveying argues that a Rule of Court can act as an implied, partial repeal of a legislative enactment. This is beyond the power of the Judiciary. See *New Jersey Chamber of Commerce* v. *New Jersey Election Law Enforcement Commission*, 82 N.J. 57, 82 (1980).

It is significant to note that the 1949 amendment was enacted four years after the landmark case of *International Shoe Co.* v. *Washington*, 326 U.S. 310 (1945). There the United States Supreme Court held that a state's jurisdictional powers extended beyond its borders to reach parties who have had "certain minimum contacts" with the state "such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *Id.* at 316 (quoting *Milliken* v. *Meyer*, 311 U.S. 457, 463

(1940)). The Legislature must be presumed to have been aware of this development when it acted to remove only represented corporations from the tolling provisions of N.J.S.A. 2A:14-22. In the absence of legislative action expressly incorporating amenability to long-arm service as an exemption from the tolling statute, that class of foreign corporations remains subject to its effect.[10]

This conclusion is in accord with the results we have reached in developing a *"common law of limitations." Galligan* v. *Westfield Centre Service, Inc.*, 82 N.J. 188, 191 (1980). We have consistently endeavored, where in keeping with the underlying purposes of statutes of limitations, to preserve a plaintiff's opportunity to have his claim adjudicated on the merits. See, *e.g., Galligan*, 82 N.J. at 193; *Kaczmarek* v. *New Jersey Turnpike Auth.*, 77 N.J. 329, 338 (1978); *White* v. *Violent Crimes Compensation Board*, 76 N.J. 368, 379 (1978). In this case defendant argues that denying plaintiff such an opportunity is consonant with the underlying purposes of the tolling statute.

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[10] We note that whatever hardship on foreign corporations might be caused by continued exposure to suit can be easily eliminated by the designation of an agent for service of process within the State. Contrary to defendants' and our Brother Sullivan's contentions, see *post* at — (slip op. at 1-2), the length of a defendant's exposure to suit without such an agent will not be determined solely by a plaintiff's convenience. If a plaintiff's delay is *inexcusable* and has resulted in *prejudice* to the defendant, the latter may raise the equitable defense of *laches* to bar the claim. See *West Jersey Title & Guaranty Co.* v. *Industrial Trust Co.*, 27 N.J. 144 (1958); *Pavlicka* v. *Pavlicka*, 84 N.J. Super, 357 (App.Div. 1964); *Pfeffer* v. *Delran Tp.*, 159 N.J. Super. 497 (Law Div. 1978). Since this appeal comes to us after a grant of summary judgment, we have no opportunity to assess the merits of that defense here.

Not only do defendants misconstrue those purposes, but the approach they advocate is contrary to the "'just accommodation' of individual justice and public policy," *Galligan*, 82 N.J. at 192-193 (quoting *Lopez* v. *Swyer*, 62 N.J. 267, 274 (1973)), which seeks to avoid "obvious and unnecessary harm [to] individual plaintiffs." *Id.* at 192; see, *e.g.*, *Fox* v. *Passaic General Hosp.*, 71 N.J. 122, 125-126 (1976); *Kyle* v. *Green Acres at Verona, Inc.*, 44 N.J. 100, 109 (1965).[11]

B

Turning to defendants' constitutional claims, we find them similarly unpersuasive.[12]

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[11] Our Brother Sullivan's reliance on *Galligan* and *White* is therefore misplaced. Neither case dealt with the tolling provision at issue here. In rejecting the "harsh approach of literally applying the statute of limitations," *Galligan*, 82 N.J. at 192 (quoting *Kyle*, 44 N.J. at 109), the Court in those cases avoided the infliction of unnecessary harm on plaintiffs. See *Galligan*, 82 N.J. at 192-193; *White*, 76 N.J. at 379. We do the same here by refusing to deny plaintiffs the benefit of a *tolling* statute to which they are clearly entitled. Justice Sullivan's approach would have us avoid rigid language for the purpose of barring plaintiff's assertion of his claim—a result directly contrary to that reached in *Galligan* and *White*, which the dissent has cited for its support. *Post* at — (slip op. at 3).

[12] Defendants base their claims of unconstitutionality on the Fourteenth Amendment to the Federal Constitution. We note, however, that our analysis would be identical if the challenges had been based on State constitutional grounds. See *Taxpayer's Ass'n of Weymouth Tp.* v. *Weymouth Tp.*, 80 N.J. 6, 42-44 (1976), app. dism. and *cert.* den. *sub nom. Feldman* v. *Weymouth Tp.*, 430 U.S. 977 (1977).

Appendix A

Equal Protection

Defendants do not contend that the classification employed in N.J.S.A. 2A:14-22 implicates any fundamental interest or "suspect class." Rather they assert that a distinction between foreign corporations represented within the State and those unrepresented but amenable to long-arm service lacks any rational relation to the governmental objective sought to be advanced by the tolling statute. Their argument is that the continued expansion of extra-territorial jurisdiction has undermined the rationality of distinguishing between foreign corporations represented in New Jersey and unrepresented foreign corporations that are amenable to long-arm service outside the State. Defendants therefore challenge as irrational the tolling statute's application to the latter.

The Court in *Lemke* rejected a similar constitutional challenge to the statute's distinction between resident and non-resident motorists. See 41 N.J. at 302-303. Although the issue there decided is not identical to that now before us, the principles on which the Court relied continue to provide the proper framework for analysis.[13] They support a finding of constitutionality.

Legislative enactments are presumed to be valid and the burden on the proponent of invalidity is a heavy one. *E.g.*,

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[13] Defendants again attempt to negate the precedential value of the *Lemke* case. They reiterate the distinctions discussed *supra* at — (slip op. at 10-11), and rely heavily on the fact that defendants in *Lemke* conceded there was a rational basis for establishing resident and nonresident classes. See 41 N.J. at 302. We agree with Appellate Division that such an admission is "hardly any basis for detracting from the court's decision that the application of the tolling statute was constitutional." 168 N.J. Super. at 526.

Hutton Park Gardens v. *West Orange Town Council*, 68 N.J. 543, 564-565 (1975). The challenger must demonstrate that the classification lacks a rational basis in relation to the object of the legislation. *E.g., Dome Realty, Inc.* v. *City of Paterson*, 83 N.J. 212, 243 (1980) (slip op. at 43); *State* v. *CIB Int'l*, 83 N.J. 262, 274-275 (1980) (slip op. at 15); *Salorio* v. *Glaser*, 82 N.J. 482, 516 (1980) (slip op. at 40); *Taxpayers' Ass'n of Weymouth Tp.* v. *Weymouth Tp.*, 80 N.J. 6, 40 (1976), app. dism. and *cert.* den. *sub nom. Feldman* v. *Weymouth Tp.*, 430 U.S. 977 (1977). Even if the original, stated purpose of an enactment refers to conditions that no longer exist, a classification survives this minimal constitutional scrutiny as long as it possesses a conceivable rational basis in present-day circumstances. *McKenney* v. *Byrne*, 82 N.J. 304, 317-318 (1980).

The flaw in defendants' argument is that it recognizes as rational only a distinction based on the impossibility of obtaining jurisdiction over a foreign corporation. It refuses to acknowledge that among amenable foreign corporations there are degrees of difficulty in effecting service. *A recognition of these degrees of difficulty supplies a present rational basis for distinguishing between represented corporations and those unrepresented but amenable to long-arm service.*

The purpose of the statute is not confined to providing relief when service is impossible. Even where absent residents could be served outside the State, the statute still provides for tolling. See *Fidelity Deposit Co. of Maryland* v. *Abagnale*, 97 N.J.Super. at 143-144. There is a conceivable rational basis to support tolling.

> [T]he view might have prevailed that the facility of extra-territorial service did not meet the hardship

> of locating a departed resident in the sprawling country beyond New Jersey's borders. [Id. at 144]

In the 1949 amendment, the Legislature re-expressed its purpose with regard to corporations. It withdrew some of the protection it had afforded plaintiffs suing foreign corporations. Corporations represented in New Jersey, like New Jersey residents present within the State, were made exempt from the statute's tolling effects. However, plaintiffs were still not required to search for defendants outside the jurisdiction and succeed within a definite period of time. Thus, the amendment struck a balance between protecting plaintiffs with claims against foreign corporate defendants and imposing excessive exposure to suit upon those defendants that were represented within the State. We agree with plaintiffs that the availability of long-arm service has not destroyed the rationality of the classification used in striking this balance.

As the Appellate Division correctly observed, the reasonable basis for the distinction "is demonstrated merely by a reading of our rules pertaining to service of process," 168 N.J.Super. at 527. Rule 4:4-4(c)(1) provides that service may be made

> [u]pon a domestic or foreign corporation, by serving, • • • either an officer, director, trustee, or managing or general agent; or any person authorized by appointment or by law to receive service of process on behalf of the corporation; or the person at the registered office of the corporation in charge thereof. If service cannot be made upon any of the foregoing, then it may be made upon the person at the principal place of business of the corporation in this State in charge thereof, or if there is no place

> of business in this State, then upon any servant of the corporation within this State acting in the discharge of his duties. *If it appears by affidavit of plaintiff's attorney or of any person having knowledge of the facts that after diligent inquiry and effort personal service cannot be made upon any of the foregoing* and if the corporation is a foreign corporation, then, consistent with due process of law, service may be made by mailing, by registered or certified mail, return receipt requested, a copy of the summons and complaint to a registered agent for service, or to its principal place of business, or to its registered office. [R. 4:4-4(c)(1) (emphasis added)]

Under our rules, extra-territorial service is not simply an alternative to service within the State. Plaintiffs may not resort to out-of-state service unless proper efforts to effect service in New Jersey have failed. The rule imposes a further burden on a plaintiff by requiring him to gather sufficient information to satisfy a court that service is "consistent with due process of law." Since long-arm service is more burdensome than service within the State, a rational distinction exists between corporations that are amenable to service within the State and those that are not. This distinction supports the tolling statute's application to corporations which cannot be served with process within New Jersey. Accordingly, the statute passes constitutional muster.

Due Process

For the first time on appeal defendant Maren also claims that the statute violates the Federal Due Process Clause.

Appendix A

The same obstacles which defendants failed to overcome in asserting their equal protection claim block their path here as well.

The constitutional guarantee of substantive due process requires only that the operation of a statute not be unreasonable, arbitrary or capricious, and that the means selected bear a rational relationship to a permissible legislative purpose. *Dome Realty, Inc.* v. *City of Paterson*, 83 N.J. at 235 (slip op. at 30); *Orange Taxpayers Council, Inc.* v. *City of Orange*, 83 N.J. 246, 256 (1980) (slip op. at 12-13); *Weymouth*, 80 N.J. at 44.

In this case defendants' due process claim is "little more than a restatement of the contention that [the statute] contravene[s] principles of equal protection." *Weymouth*, 80 N.J. at 45. In providing for tolling of the statute of limitations under certain circumstances—absence of a resident, nonresidence in the case of an individual and nonrepresentation in the case of a corporation—the statute is substantially tailored to protect a plaintiff's cause of action when service of process on a defendant is most likely to present difficulties.

Conclusion

For the foregoing reasons the judgment of the Appellate Division is affirmed.

Chief Justice Wilentz and Associates Justices Clifford, Schreiber and Pollock join in this opinion.

Justice Sullivan has filed a separate dissenting opinion in which Justice Handler joins.

Appendix A

SUPREME COURT OF NEW JERSEY

A-72/143 SEPTEMBER TERM 1979

KONSTANTINOS VELMOHOS, also known as VELMOHOS KONSTANTINOS,

Plaintiff-Respondent

v.

MAREN ENGINEERING CORPORATION, an Illinois corporation, and AIR CONVEYING, INC., an Illinois corporation,

Defendants-Appellants,

and

NADUSTCO, INC., a Louisiana corporation,

Defendant.

SULLIVAN, J., dissenting.

I would construe N.J.S.A. 2A:14-22 to toll the statute of limitations as to a foreign corporation against which there is a cause of action in this State only in a situation where such corporation is not amenable to personal jurisdiction.

Defendant corporations were subject to long-arm jurisdiction in this State at all relevant times as found by the trial court. See R. 4:4-4(c)(1). Indeed, service was made upon them pursuant to the rule. To hold that despite this,

a plaintiff can sit back for any number of years and file suit at his pleasure against such foreign corporations, is to do violence to the concept of limitations of actions. The construction placed upon N.J.S.A. 2A:14-22 by the majority opinion, while following the literal language of the statute, frustrates the very purpose of the tolling provision and places this Court with a minority of jurisdictions. See Annotation, "*Tolling of statute of limitations during absence from state as affected by fact that party claiming benefit or limitations remained subject to service during absence of nonresidence*," 55 A.L.R. 3d 1158 (1974). As noted in the annotation, a majority of courts have refused to give application to tolling provisions when the party claiming the benefit of limitations has remained amenable to personal jurisdiction.

A recent comment in 10 *Seton Hall L. Rev.* 585 (1980) entitled "The Tolling Provision of the Statute of Limitations—a Haven for the Dilatory Plaintiff," makes a critical analysis of N.J.S.A. 2A:14-22 and the position now taken in the majority opinion and rejects it on constructional as well as constitutional grounds. The comment concludes by stating that "[a] statute that servies to placate the dilatory plaintiff while denying an important right to a nonresident defendant is an anomaly in a jurisdiction noted for progressive developments in the law corresponding to the changes in the circumstances to which the law applies." *Id.* at 613. Despite the rigidity of some tolling and limitations statutory provisions, this Court has always construed them to effectuate the true statutory purpose. See, *e.g.*, *Galligan* v. *Westfield Centre Service, Inc.*, 82 N. J. 188 (1980); *White* v. *Violent Crimes Compensation Board*, 76 N. J. 368 (1978). It has not done so today.

Appendix A

Although I find it unnecessary to reach the issue, the statutory construction of N.J.S.A. 2A:14-22 adopted by the majority also raises substantial questions of due process and equal protection of the laws. I would reverse the Appellate Division and reinstate the judgment of the trial court dismissing the complaint.

Justice Handler joins in this dissent.

APPENDIX B

Opinion of the United States District Court
(Filed—December 18, 1978)

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
CIVIL ACTION No. 78-1646

ROY HOPKINS,

Plaintiff,

v.

KELSEY-HAYES, INC.,

Defendant.

Appearances:

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Appendix B

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BROTMAN, District Judge

Defendant in this diversity case moves for summary judgment. Fed. R. Civ. P. 56, on the ground that plaintiff's action is barred by the applicable statute of limitations. Because we find that the running of the statute has been tolled by N.J.S.A. 2A:14-22, we hereby deny the motion.

Plaintiff is a New Jersey resident. Defendant is a foreign corporation, organized under the Delaware corporation laws. Defendant admits at ¶1 of its Answer to the Complaint and in its supplemental brief that it has not filed a certificate to do business or a certificate of authority in New Jersey and indicates that it is not otherwise represented in the State for purposes of service of process.

The suit is one to recover damages for personal injuries allegedly sustained by plaintiff when a tire mounted on a rim manufactured by defendant exploded. This occurred on May 18, 1975 in New Jersey; the suit naming this defendant was filed on April 27, 1978, almost three years after the accident. Normally, the two-year statute of limitations applicable to suits for personal injury would bar the suit, N.J.S.A. 2A:14-2. However, N.J.S.A. 2A:14-22 very explicitly provides for the tolling of such statute of limitations where and so long as "any corporation . . . not organized under the laws of this state, against whom there is such a cause of action, is not represented in this state

by any person or officer upon whom summons or other original process may be served." The statute also applies to non-resident individuals or resident individuals outside the state.[1]

Defendant argues that the New Jersey long-arm rule, R.R. 4:4-4 which became effective against corporations in September, 1958, allows the plaintiff to serve defendant by registered mail in Delaware. The defendant therefore contends that the tolling statute should be construed as

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[1] The full statutory provision reads:

2A:14-22. Nonresidence of person liable

If any person against whom there is any of the causes of action specified in sections 2A:14-1 to 2A:14-5 and 2A:14-8, or if any surety against whom there is a cause of action specified in any of the sections of article 2 of this chapter, is not a resident of this state when such cause of action accrues, or removes from this state after the accrual thereof and before the expiration of the times limited in said sections, or if any corporation or corporate surety not organized under the laws of this state, against whom there is such a cause of action, is not represented in this state by any person or officer upon whom summons or other original process may be served, when such cause of action accrues or at any time before the expiration of the times so limited, the time or times during which such person or surety is not residing within this state or such corporation or corporate surety is not so represented within this state shall not be computed as part of the periods of time within which such an action is required to be commenced by the section. The person entitled to any such action may commence the same after the accrual of the cause therefor, within the period of time limited therefor by said section, exclusive of such time or times of nonresidence or nonrepresentation.

inapplicable to it. The weight of authority is squarely against defendant on this point. The courts have reasoned that the intent of the legislature which enacted the tolling provision many years prior to the adoption of the long-arm rules must be ascertained relative to the circumstances prevailing at the time of the enactment. *Cohn* v. *G. D. Searle & Co.*, 447 F. Supp. 903, 907 (D. N.J. 1978) (corporate defendant); *Fidelity & Deposit Co. of Md.* v. *Abagnale*, 97 N. J. Super. 132, 143 (Law Div. 1967).[2] The courts in both cases construed the tolling statute as applicable in situations where the defendant was subject to service by mail under the long-arm rules.

This tolling statute has been strictly construed by the New Jersey courts in cases involving automobile accidents in New Jersey where the defendants are non-resident motorists. Cases are virtually unanimous in holding that substituted service imposed by statute, through the New Jersey Director of Motor Vehicles, N.J.S.A. 39:7-2, does not entitle the non-resident defendant to the benefit of the statute of limitation. This is true whether the defendant is an individual or a corporation. *Lackovic* v. *New England Paper Tube Co., Inc.*, 127 N. J. Super. 394 (Law Div. 1974) (corporate defendant); *Lemke* v. *Bailey*, 41 N. J. 295, 301 (1963); *Whalen* v. *Young*, 28 N. J. Super. 543 (Law Div. 1953), *rev'd on other grounds*, 15 N. J. 321 (1954) (corporate defendant); *Blackmon* v. *Govern*, 138 F. Supp. 884 (D. N. J. 1956); *Gotheiner* v.

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[2] Like the district court in *Cohn* which cited the state court holding in *Fidelity*, we perceive no important distinction for our purposes between individual and corporate defendants and will analyze the problem without regard to the type of defendant. *See also, Lackovic* v. *New England Paper and Tube Co., Inc.*, 127 N.J. Super. 394, 397 (Law Div. 1974).

Lenihan, 20 N. J. Misc. 119 (Sup. Ct. 1942). The only holding the other way, *Ferraro* v. *Ferro Trucking Co.*, 72 N. J. Super. 519 (Law Div. 1962), has been discredited. *See Lackovic* v. *New England Paper Tube Co., Inc., supra; Lemke* v. *Bailey, supra.* Thus, even where a non-resident corporation can easily be served by substituted service within New Jersey, the tolling statute applies to deny it the protection of the statute of limitations.

We perceive no relevant distinction for our purposes between the substituted service in non-resident motorist cases and long-arm service by registered mail. Moreover, the New Jersey courts have expressly noted that the rationale of the non-resident motorist cases is equally applicable to the long-arm service situation. In *Guas* v. *Guas*, 146 N. J. Super. 541 (Law Div. 1977), the state court held that a resident individual physically outside New Jersey but continuously amenable to service under the long-arm rule relative to New Jersey-licensed drivers of New Jersey-registered vehicles was still subject to the tolling statute. The court cited *Lemke* v. *Bailey, supra,* a non-resident motorist case, as conclusive support for this result. *Op. cit.* at 547. Similarly, in *Fidelity & Deposit Co. of Md.* v. *Abagnale, supra,* at 144, the state court held that *Lemke* v. *Bailey* governed the situation where a resident who became absent from the state after the accrual of the cause of action was subject to extraterritorial service by mail.

We decline to depart from this line of authority; thus, we refuse to interpret the New Jersey tolling provision to allow this defendant to invoke the statute of limitations defense simply because it is amenable to long-arm service. Our examination of the New Jersey state court authority convinces us that this is the interpretation they would render.

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The language of the tolling statute unequivocably requires a representative within the state for service of process, and does not require that a plaintiff resort to service beyond the borders of New Jersey to receive the benefits of the tolling provisions. Furthermore, the tolling statute has been on the law books since 1820, with the amendment relative to corporations enacted in 1949. The long-arm rules applicable to corporations have been in effect since 1958. Surely the New Jersey legislature is aware of the argument advanced by defendants, and it is incumbent upon it to make any change it deems appropriate. *See Lemke* v. *Bailey, supra* at 302. Finally, we note that were we to agree with defendant, the tolling provision would be meaningless with respect to non-resident corporations since the vast majority who commit torts within the state would be amenable to long-arm service. Without more authority, we cannot construe a state statute in a manner rendering it ineffective.

Defendant also argues that this construction of the tolling statute creates an arbitrary and discriminatory classification, in violation of the New Jersey and federal constitutional equal protection guarantees. We reject the argument. In doing so, we note that in the recent case of *Cohn* v. *G. D. Searle & Co., supra,* decided in this district, the court reached an opposite conclusion. We respectfully disagree with the holding of *Cohn.* Although Judge Meanor stated that his analysis was grounded in the equal protection clause and not the due process clause, we perceive his discussion to state a substantive due process holding. The *Cohn* court concluded that in light of amenability to service through the long-arm rules, the distinction between domestic and foreign corporations embodied in the tolling statute "bears no rational rela-

tionship to the object of the tolling statute." *Id.* at 912. We view this as a substitution of the court's judgment on the policies behind the tolling statute for that of the legislature. Indeed, in *Fidelity & Deposit Co. of Md.* v. *Abagnale, supra,* at 144, the New Jersey court saw a reasonable basis for distinguishing between defendants servable in New Jersey and those servable only outside New Jersey:

> ". . . the view mig' t have prevailed that the facility of extra-territorial service did not meet the hardship of locating a departed resident in the sprawling country beyond New Jersey's borders."

In addition, the New Jersey Supreme Court has held that there is no constitutional infirmity under either the state or the federal constitution, in a case where the defendant non-resident motorist was amenable to substituted service within New Jersey. *Lemke* v. *Bailey, supra* at 303. In our case where there are greater hardships associated with service outside the state under a long-arm rule, *a fortiori,* the distinction drawn by the tolling statute is rational and passes constitutional muster.

Having denied the motion based on N.J.S.A. 2A:14-22, there is no need to reach the "discovery rule" issue. The motion for summary judgment is hereby denied.

STANLEY S. BROTMAN
United States District Judge

DATED: December 18, 1978